In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1654

RALPH GINZBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 14, 1963, after a non-jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 28 counts of mailing obscene publications and advertisements for those publications in violation of 18 U.S.C. 1461. He was sentenced to five years' imprisonment and fined $28,000.[1] The conviction was affirmed by the court of appeals, 338 F. 2d 12 (Pet. A17–A26), and by this Court, 383 U.S. 463 (Pet. A28–A66).

[1] Petitioner was fined $1,000 on each of the 28 counts. He was sentenced to concurrent terms of three years' imprisonment on Counts 11 through 16, and to concurrent terms of two years' imprisonment on Counts 17 through 22, to commence upon expiration of the terms imposed under Counts 11 through 16.

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Petitioner subsequently filed a petition for reconsideration of sentence in the district court, which was denied without a hearing (Pet. A66). The court of appeals initially affirmed, but after rehearing *en banc,* three judges dissenting, remanded for a hearing on the sentence 398 F. 2d 52 (Pet. A67–A91). After a hearing, the district court denied a motion to vacate, suspend, or reduce the concurrent three-year terms on Counts 11 through 16; however, it made the sentences subject to 18 U.S.C. 4208(a)(2), which renders the prisoner eligible for parole at such time as the board of parole may determine. The court granted petitioner's motion to vacate the prison sentence as to Counts 17 through 22; on these counts it placed him on two years' probation to commence upon his release from custody. In short, the original sentence of five years' imprisonment was reduced to three years, subject to parole at the discretion of the parole board, to be followed by two years' probation. The fines imposed under the original sentence were left standing. The court of appeals affirmed *per curiam,* 436 F. 2d 1386 (Pet. A94), and denied rehearing *en banc* (Pet. A95–A98).

Petitioner presents no issue which warrants further consideration by this Court. The evidence relating to petitioner's culpability, his character, the potential hardship to his family should he be imprisoned, and his promise to abide by the law were fully explored at the hearing before the district judge who reduced the prison term. Considering the purpose, nature and magnitude of petitioner's enterprise, already

noted by this Court (see 383 U.S. 463, at 466–468), the sentence ultimately imposed was well within the judge's discretion.

Petitioner's remaining contention, that the district court erred in imposing concurrent sentences rather than a single sentence, is insubstantial. The statute validly punishes use of the mails for the transmission of obscene materials. *Roth* v. *United States*, 354 U.S. 476, 493; *United States* v. *Reidel*, decided May 3, 1971 (No. 534, this Term). Since each mailing constituted a separate offense, the sentence was in conformity with the statute. Compare *Gore* v. *United States*, 357 U.S. 386.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[2] In *Ladner* v. *United States*, 358 U.S. 169, relied on by petitioner, this Court ruled that cumulative sentences could not be imposed to punish the single act of discharging a shotgun though the blast had wounded two federal officers. *Ladner* is inapposite to the present case, which seeks to punish discrete acts of mailing obscene materials and where concurrent terms were imposed. Compare *Benton* v. *Maryland*, 395 U.S. 784, 791.

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